Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Exclusive Service Contracts for Provision of	)	MB Docket No. 07-51
Video Service in Multiple Dwelling Units and	)	
Other Real Estate Developments	)	

Comments of SureWest Communications

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SUMMARY

In these Comments, SureWest Communications demonstrates (1) that exclusive service contracts constitute significant barriers to access to multiple dwelling unit buildings ("MDUs") for competitive video providers, thus impeding competition in the delivery of video programming, and impeding the deployment of advanced broadband networks; (2) that as a result, the Commission should prohibit multichannel video program distributors ("MPVDs") from enforcing existing, and from entering into new, exclusive service contracts in MDUs and real estate developments; and (3) that statutory provisions broadly empowering the Commission and requiring the FCC to promote video competition and the deployment of advanced networks, provide the Commission with the legal authority to do so.

Currently, about 21,000 customers take multichannel video service from SureWest, either alone or in combination with other services (as part of the "Triple Play"). In all of these cases, SureWest is the new competitor against the incumbent cable TV operator. As a relatively new entrant to the multichannel video program distributor ("MVPD") service market, companies like SureWest must overcome numerous economic barriers just to enter the MV business. Nevertheless, SureWest believes that in a fairly competitive market where consumers can freely choose among all providers of MV services, the quality of its products and services will allow it to succeed, and consumers will benefit from such competition. However, MDU exclusive service contracts undercut that fair competition, as they are used primarily by incumbent cable TV operators to "lock up" large groups of potential customers by preventing the competing MVPDs from reaching these potential customers, and by preventing the MDU residents from being able to choose their preferred MVPD (and in some cases their preferred Internet broadband service provider). SureWest has confirmed in a recent survey that at least 28 percent of the MDU units passed by SureWest's network are locked into exclusive service contracts which bar SureWest (and other competitive MVPDs) from providing and/or marketing MV services to residents in those units. An additional 31 percent of those MDU units are in MDUs whose status *vis a vis* exclusive service contracts SureWest cannot verify with certainty at this time, and thus, the total of "locked up" MDU units passed could be as high as 59 percent. Comcast is the MVPD party to contracts that represent 85.7 percent of these "locked up" MDU units. Given that Census Bureau data shows that approximately 25% of total occupied housing units in the nation are MDUs, if SureWest's experience is reflected nationwide, then exclusive service contracts prevent a very large number of MDU residents from enjoying the benefits of video competition. Further, given that the majority of MDU residents are renters, and that statistically renters typically have lower incomes than residents who own their own housing, the fact that MDU exclusive service contracts not only deny choice, but as a result appear to reduce price competition, becomes even more critical.

SureWest fully agrees with the finding recently made by the Commission in the recent cable franchising proceeding that the provision of MV services and the deployment of advanced broadband infrastructure are "inextricably linked." As the

Commission recognized therein, broadband deployment is expensive, and the risk of investing in wiring an MDU for advanced broadband services is justified only if the provider has an opportunity to compete for the subscribers' business in video, as well as voice and data services. Although some commenters in prior proceedings have claimed that exclusive contracts provide public interest benefits, SureWest submits that to the extent these benefits ever existed, changes in the market and the passage of time have eliminated them. While it may have been true a few years ago that uncertainty about the ability of a provider to recover the entire cost of serving an MDU from revenues generated by MVPD service alone was a disincentive to investing in wiring an MDU, the ability to generate multiple revenue streams from "triple play" offerings (i.e., bundled MVPD, telephony and broadband access) means that service providers do not need the guarantee of MVPD exclusivity as an incentive to investment. The fact that a new entrant such as SureWest is ready, willing and able to compete without such guarantees certainly undercuts the notion that such guarantees are necessary. Nevertheless, while new entrants do not require a guarantee of the entire MV service revenue in order to justify investment in broadband facilities in an MDU, good business practice requires that providers have at least an opportunity to compete for and obtain revenue from MV services from a certain percentage of MDU residents. Without that opportunity, the broadband investment cannot be justified or sustained. Thus, by denying competing providers the opportunity to recover at least some of their costs from MV service revenues, exclusive contracts are a barrier to the deployment of broadband networks, not an enhancement to such deployment.

The Commission has previously recognized the anti-competitive implications of exclusive service contracts, but failed to take action because at that time it believed that there was "insufficient evidence in the record as to "the extent to which exclusive contracts have been utilized" as well as whether "such contracts have thwarted alternate providers' entrance into the MDU market...." SureWest is confident that the record at the current time shows that there is broad use of exclusive service contracts in MDUs, and that such use is a significant entrance barrier for competitive providers of MV services, and prevents competitive choices for consumers. Moreover, there have been substantial changes in the MVPD market since the Commission last looked at this issue: (1) there has been increased *convergence* of services and service delivery, making voice, data and video services capable of delivery over a single, unified, delivery platform; (2) the advent and increasing use of *IP technology* in MV and telecommunications facilities to provide unique and new services to consumers; (3) there is much more *packaging* of MV services with voice and data services than a few years ago, resulting in greater potential price savings for consumers; and (4) in the last few years, there has been a substantial growth in the number of *new entrants* to the MVPD market.

The Commission certainly has the legal authority to enact the prohibitions suggested herein. Sections 1, 4(i) and 303(r) of the Communications Act provide the Commission with broad authority to make rules and impose restrictions to fulfill the goals and functions placed on the Commission by Section 601 and other Sections of the Communications Act, as well as by Section 706 of the 1996 Telecommunications Act. Indeed, in its recent *Franchising R&O*, the Commission specifically relied on Sections 1, 4(i) and 303(r) as a basis for its actions therein. Similarly, Section 623 of the Communications Act requires the Commission to ensure that the rates for the basic cable service are reasonable, and by its terms, Section 623 expresses a preference for competition over direct regulation of rates. Because allowing alternative service providers to compete for MDU consumers will inevitably act to contain rates at a "reasonable" level, the prohibition of exclusive contracts is an appropriate, indeed preferable, way of accomplishing the mandate of Section 623. Following this reasoning, the Commission has already concluded that regulation of MDU inside wiring would help to ensure reasonable rates by promoting competitive choice. Likewise, the Commission reached the same conclusion in the *Competitive Networks* proceeding, in which it prohibited exclusive contracts in certain multiple tenant environments. Furthermore, Section 706 of the 1996 Telecommunications Act directs the Commission to "encourage deployment of advanced telecom capability to all Americans." SureWest, like many other providers, offers a "triple play" of video, voice and broadband data service. A fundamental building block of the "triple play," however, is the ability to offer video service. As the Commission recently concluded in the *Franchising R&O*, "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically…." An appropriate way of accomplishing the goals of Section 706 is to promote competition in the markets served by broadband networks. Lastly, As the Commission noted in the *NPRM*, Section 628(b) specifically prohibits "unfair methods of competition or unfair or deceptive acts or practices." Exclusive service contracts are a fundamentally unfair practice insofar as they effectively eliminate the benefits of competition and choice without any corresponding benefit to the consumers subject to such contracts. The Commission made a similar finding in the *Competitive Networks* proceeding, and that finding applies equally to MVPD exclusive service contracts. Both the Federal Trade Commission and courts have held that similar contracts constitute "unfair methods of competition or unfair or deceptive acts or practices" under Section 5 of the Federal Trade Commission Act.

Accordingly, the Commission should prohibit enforcement not only of future contracts, but of existing contracts as well. The Commission has the legal authority to do so, as the U.S. Court of Appeals for the D.C. Circuit has held that the Commission has the power to modify provisions of private contracts when necessary to serve the public interest. In addition to prohibiting the enforcement of existing agreements, the Commission should also prohibit MVPDs from entering into *new* agreements. SureWest believes that if MVPDs are allowed to enter into new exclusive service agreements, even if the MVPD cannot enforce such agreements, the owner of the MDU may not understand that the agreement is not enforceable, and as a result, may inadvertently discourage competitors from offering service to the residents of that MDU. Indeed, unless MVPDs are prohibited from entering into new exclusive service agreements, an MVPD and an MDU owner may enter into an agreement with the intent of purposefully discouraging the offering of service by a competitive MVPD by forcing that MVPD to litigate the non-enforceability of the agreement.

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SureWest Communications ("SureWest"), by its attorneys, hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 07-32, released March 27, 2007, in the above-captioned proceeding ("*NPRM*"). In these Comments, SureWest addresses the questions raised in the *NPRM* regarding exclusive service contracts. Such contracts constitute significant barriers to access to multiple dwelling unit buildings ("MDUs") for competitive video providers, thus impeding competition in the delivery of video programming and the deployment of advanced broadband networks. Accordingly, the Commission should prohibit multichannel video program distributors from entering into new or enforcing existing exclusive service contracts for MDUs.

I. Introduction

With over 90 years of providing service in Northern California, SureWest's family of companies provide an integrated network of advanced communications products and services. While its origins are as an incumbent local exchange carrier and it continues to provide local and long distance voice services, SureWest now also provides fiber-based broadband data services with digital multichannel video ("MV") services over a number of different IP platforms using different technologies. SureWest's subsidiary SureWest Broadband provides IP fiber-to-the-home, IP copper to the home, and some legacy co-axial cable MV services, along with advanced video-on-demand and pay-per-view features. SureWest's MV services are typically marketed as part of a package of services that includes voice and broadband data services ("Triple Play"). Currently, about 21,000 customers take IP MV service from SureWest, either alone or in combination with other services. In all of these cases, SureWest is acting as the "overbuilder" or the new competitor against the incumbent cable TV operator.

As a relatively new entrant to the multichannel video program distributor ("MVPD") service market, companies like SureWest must overcome numerous economic barriers just to enter the MV business. In addition, SureWest must compete against a major national incumbent cable operator, as well as against incumbent national satellite operators and other MV providers. Nevertheless, SureWest believes that in a fairly competitive market where consumers can freely choose among all providers of MV services, the quality of its products and services will allow it to succeed, and consumers will benefit from such competition. However, MDU exclusive service contracts undercut that fair competition, as they are used primarily by incumbent cable TV operators to "lock up" large groups of potential customers by preventing the competing MVPDs from reaching these potential customers, and by preventing the MDU residents from being able to choose their preferred MVPD.

II. MDU Exclusive Service Contracts Constitute a Barrier to MVPD Competition and to Deployment of Advanced Broadband Networks.

It has been the experience of SureWest that exclusive service contracts constitute significant barriers to entry and thus greatly impede competition in the MVPD service market. Additionally, such contracts make it more expensive overall to compete, and they discourage investment in and deployment of advanced broadband networks.

SureWest's network currently passes MDUs with 40,138 units which could be served with SureWest MV services. However, SureWest has confirmed that at least 28 percent of those units are in MDUs whose owners or managers are locked into exclusive service contracts which bar SureWest (and other competitive MVPDs) from providing and/or marketing MV services to residents in those units.[1] An additional 31 percent of those MDU units are in MDUs whose status *vis a vis* exclusive service contracts SureWest cannot verify with certainty at this time, and thus, the total of "locked up" MDU units passed could be as high as 59 percent.[2] Comcast, the dominant

[1] In the Cities of Roseville, Granite Bay and Citrus Heights, the historic core of SureWest's network, 35.8 percent of the MDU units passed are known to be locked into exclusive service contracts with other MVPDs. SureWest is unable to ascertain at this time the status in regards to an additional 11.40% of those MDU units.

[2] It should be noted that while SureWest has devoted extensive resources in a May 2007 survey to identify the status of all of the MDUs passed by its network, it is very difficult to provide absolute certainty as to the holder of exclusive service rights in each and every MDU, the length of such exclusive contracts, and the terms of those contracts. It is part of the insidious and anti-competitive nature of such contracts that competitors (and, it is believed, even the affected residents of the MDUs) usually cannot get access to see the contracts at issue. In doing research for these Comments, SureWest contacted 100 percent of the MDUs passed by its network. When SureWest attempted to obtain information regarding the status of a particular MDU, sometimes the authorized agent of the MDU did not respond to inquiries, but even when the MDU management provided some information, it rarely allowed SureWest to review the particular contract at issue. This may result in part from confidentiality provisions in the exclusive access contracts.

MVPD in SureWest's service area, is the MVPD party to contracts that represent 85.7 percent of these "locked up" MDU units.[3] While MDUs have not shared copies of the contracts with SureWest, statements from the managers of the MDUs suggest that most of the contracts range from 1 to 10 years in length.

The common result of the presence of MDU exclusive service contracts is that residents of the MDUs are denied the opportunity to take service from their preferred MVPD, and in some cases, their preferred broadband service provider as well. One example of the situation where consumers wanted to take service from SureWest, but were barred from doing so, involved Stone Ridge Apartments, a 230 unit apartment community in the City of Roseville. SureWest contacted Stone Ridge about offering Digital TV services to their residents, and in January of 2006, Stone Ridge's property management service, FPI, invited SureWest to offer services. On January 27, 2006, SureWest held an event on-site, with FPI's permission. Over 20 residents agreed to purchase SureWest MV service, favoring SureWest's programming offering and the pricing for digital MV services, in addition to the competitive price breaks received for bundling MV with voice and Internet services. However, on February 11, 2006, SureWest received an email from FPI, stating that FPI and the owner of Stone Ridge had made an oversight and subsequently realized that there was an exclusive agreement with Comcast for TV and Internet services, preventing SureWest from selling

[3] The remainder of the exclusive contracts are held by AT&T, DirecTV and Dish Network, with less than 5 percent of the remainder believed to be held by a number of smaller competitive MVPDs. Several MDUs appear to be subject to exclusive service contracts that not only bar access to wireline MVPD competitors such as SureWest, but also bar residents from taking service from DBS operators.

MV and Internet services to the residents of Stone Ridge. As a result, FPI prevented SureWest from installing and providing MV and internet services to those customers. SureWest incurred unnecessary and significant marketing and manpower expenses, while a number of the residents subsequently vigorously complained about this situation to SureWest.

SureWest's experience is that MDU exclusive service contracts are a substantial barrier to competition in the MVPD market, as they completely deny MDU residents the ability to choose their preferred MVPD.[4] The breadth of the anti-competitive impact of exclusive service contracts becomes more clear when one considers that Census data shows that approximately 24% of total occupied housing units (201,055 units) located in the Sacramento region as of December 2005 were multiple dwelling units.[5] However, the use of exclusive service contracts is obviously not limited to MDUs in SureWest's service area, but rather, is a nation-wide concern, as the record in other Commission proceedings demonstrates that MDU exclusive service contracts are used in numerous locations. Thus, the Commission should take notice of the fact that approximately 25% of total occupied housing units in the nation (27.8 million units as of 2005) are multiple

[4] Furthermore, as noted above, in some cases these exclusive service contracts also deny MDU residents the ability to choose their preferred Internet broadband service provider.

[5] Sacramento Regional Research Institute, December 2005, Figure 15, Data Source: California Department of Finance, E-4 and E-5 Estimates.

dwelling units.[6] If SureWest's experience is reflected nationwide, then exclusive service contracts prevent a very large number of MDU residents from enjoying the benefits of video competition. Given that the majority of MDU residents are renters, and that statistically renters typically have lower incomes than residents who own their own housing, the fact that MDU exclusive service contracts not only deny choice, but as a result appear to reduce price competition, becomes even more critical. [7]

SureWest fully agrees with the finding recently made by the Commission in another proceeding that the provision of MV services and the deployment of advanced broadband infrastructure are "inextricably linked."[8] As the Commission recognized

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[6] *See*, United States Census Bureau, 2005 American Community Survey, Table S2504 Physical Housing Characteristics for Occupied Housing Units, Renter-Occupied 2+Apartment Units in Structure, available at http://factfinder.census.gov/servlet/STTable?_bm=y&_qr_name=ACS_2005_EST_G00_S2504&-geo_id=01000US&-ds_name=ACS_2005_EST_G00.

[7] Even homeowners in non-MDU residential developments, however, are not immune to the adverse effects of exclusive service contracts. An increasing number of real estate developers have signed such exclusive contracts for their developments. As with MDU owners, the developer typically receives a percentage of the revenues, while the MVPD obtains exclusive access to the homes within the development. Residents of the development, meanwhile, are left without a choice of providers and without options as service declines and prices increase. Indeed, the investments such residents have made in their homes make such residents even more captive to the exclusive agreements than renters with year-to-year or month-to-month leases. *See e.g.,* Kim Hart, In Suburbs, Locked Into a High-Tech Lure, Washington Post, May 21, 2007 at page A1, available at http://www.washingtonpost.com/wpdyn/content/article/2007/05/ 20/AR2007052001724_pf.html.(describing the adverse effects of exclusive agreements for video, voice and data service in residential developments in the Washington, D.C. suburbs). Accordingly, the exclusive service contract prohibition should apply to non-MDU real estate developments as well as to MDUs.

[8] *See, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as Amended by the Cable Television and Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 5101 (2007) ("*Franchising R&O"*) at para. 51.

therein, broadband deployment is expensive, and the risk of investing in wiring an MDU for advanced broadband services is justified only if the provider has an opportunity to compete for the subscribers' business in video, as well as voice and data services. SureWest regularly makes these business risk determinations in deciding whether to deploy advanced broadband facilities in an MDU.

As a corollary, from an investment standpoint if competition exists in a provider's core area and fulfills the return expectations, then the MDU deployment can be more fully extended to the provider's outlying areas. In the case of the "triple play," providers have determined there must be the ability to offer all three services to meet required revenue metrics. Meeting those revenue benchmarks can allow added internal financing and subsequent deployment in more underserved areas not available under business plans based on provision of only a single service.

Even in cases where MDU exclusive service contracts do not discourage the deployment of advanced networks, in certain circumstances they can nevertheless lead to remarkable economic inefficiencies that are contrary to the interests of consumers. For example, SureWest provides IP MV service not only in its CLEC service areas, but also in conjunction with its legacy ILEC operations. In such situations, the IP provision of MV service is provided over the same copper or fiber facilities as the voice service. Typically, the voice service in these MDUs is not subject to any exclusive access arrangement, and in that case SureWest may need to just "flip a switch" or deploy a limited amount of additional plant in order to provide MV service to the present voice subscribers. If the subscriber resides in a building with an MV exclusive service contract, however, SureWest still cannot provide that video service, even though

SureWest often can do so without imposing any new construction burden on the structure (since the necessary wiring is already in place and being used for telephone services). Allowing an MVPD competitor such as SureWest to provide video service in such a situation would promote efficient use of the network cable in place, and would allow SureWest to pass along the resulting economic efficiencies to the subscriber in the form of lower prices. This result would promote competition choice of services to the benefit of consumers.

III. The Commission Should Prohibit MVPDs From Entering into New, and Enforcing Existing, MDU Exclusive Service Contracts.

As demonstrated above, MDU exclusive service contracts are a significant barrier to entry, impeding MVPD competition and deployment of advanced broadband networks. Accordingly, the Commission should prohibit MVPDs from entering into new, and enforcing existing, MDU exclusive service contracts.

A. Federal Policy in Favor of MVPD Competition Mandates Such a Prohibition.

There is little doubt that the enforcement of exclusive service contracts negatively impacts MV service competition generally, and specifically in the MDUs subject to such contracts. The anti-competitive effect of exclusive service contracts is the same regardless of whether the agreement is held by an incumbent MVPD or a new entrant: in either case the MDU residents are "captives" who are denied the benefits of competition on price and services, while the owners, managers or developers of the MDU may reap financial benefits from the favored MVPD at the expense of the MDU resident. This state of affairs is contrary to the pro-competitive policies of the Communications Act and the Commission. As the Commission stated in the Notice of

Proposed Rulemaking in the recent proceeding on Section 621(a) of the Act, while most consumers have choice between a cable TV operator and two direct broadcast satellite providers, even "greater competition in the market for multichannel video programming is one of the primary goals of federal communications policy. Increased competition can be expected to lead to lower prices and more choices for consumers ...."[9] When the Commission took action in that proceeding, it noted that "[t]he legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace ....."[10] In order to fully effectuate this important Federal policy, the Commission must act similarly in this proceeding to prohibit MVPDs from entering into new or enforcing existing exclusive service contracts.

B. The Prohibition Should Include Entering Into New Agreements, as Well as Enforcement of Existing Agreements.

In addition to prohibiting MVPDs from enforcing *existing* exclusive service agreements, the Commission should prohibit MVPDs from entering into *new* agreements. SureWest believes that if MVPDs are allowed to enter into new exclusive service agreements, even if the MVPD cannot enforce such agreements, the owner of the MDU may not understand that the agreement is not enforceable, and as a result, may inadvertently discourage competitors from offering service to the residents of that

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[9] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as Amended by the Cable Television and Consumer Protection and Competition Act of 1992,Notice of Proposed Rulemaking*, 20 FCC Rcd 18581 (2005).

[10] *Franchising R&O,* 22 FCC Rcd 5158 at para. 130, citing H.R. REP. NO. 98-934, at 19 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; S. REP. NO. 97-518, at 14 (1982) ("free and open competition in the marketplace" and the "elimination and prevention of artificial barriers to entry" are essential to the growth and development of the cable industry); H.R. REP. NO. 102-862, at 77-78 (1992) (Conf. Rep.), *as reprinted in* 1992 U.S.C.C.A.N. 1231, 1259-60.

MDU. Indeed, unless MVPDs are prohibited from entering into new exclusive service agreements, an MVPD and an MDU owner may enter into an agreement with the intent of purposefully discouraging the offering of service by a competitive MVPD by forcing that MVPD to litigate the non-enforceability of the agreement. The Commission can discourage these anti-competitive results by prohibiting MVPDs from entering into new agreements as well as enforcing existing agreements.

C. The Current State of the MVPD Market Mandates Commission Action.

The Commission has previously recognized the anti-competitive implications of exclusive service contracts,[11] but failed to take action because at that time it believed that there was "insufficient evidence in the record as to "the extent to which exclusive contracts have been utilized" as well as whether "such contracts have thwarted alternate providers' entrance into the MDU market...."[12] SureWest is confident that the record at the current time shows that there is broad use of exclusive service contracts in MDUs, and that such use is a significant entrance barrier for competitive providers of MV services, and a barrier to competitive choices for consumers. Moreover, there have been substantial changes in the MVPD market since the Commission last looked at this issue:

1. There has been increased ***convergence*** of services and service delivery, making voice, data and video services capable of delivery over a single, unified,

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[11] *Report and Order and Second Further Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 3659, 3754 (1997).

[12] *First Order on Reconsideration and Second Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 18 FCC Rcd 1342, 1369 (2003).

delivery platform. Commonly, these services are uniformly digitalized and can be indistinguishable when transported over the same platform.

2. The advent and increasing use of ***IP technology*** in MV and telecommunications facilities can provide unique and new services to consumers. However, if a new entrant offering new IP-based services is barred from serving an MDU, the residents cannot access those services.

3. There is much more ***packaging*** of MV services with voice and data services than a few years ago, resulting in greater potential price savings for consumers. However, those price savings are premised on the cost-savings associated with the ability to offer voice, video and data through the same network. If the provider is barred from offering MV service, the ability to pass along cost savings to the consumer is largely eliminated.

4. In the last few years, there has been a substantial growth in the number of ***new entrants*** to the MVPD market. This has largely been driven by changes in technology which allow for more efficient and economic packaging of services, as well as by changes in state laws to allow franchise approval at the state level. However, even if a new entrant can now obtain a franchise more easily, the presence of that franchise does not allow the new entrant to provide service to an MDU subject to an exclusive service agreement.

The evidence of anti-competitive harms caused by exclusive service contracts has led a limited number of states to pass laws mandating access for MVPDs to MDUs and other developments. However, while mandatory access laws provide some protections to residents in those states, they do nothing to protect residents of states (such as California) without such laws. For this reason, the Commission must act to provide a federal solution to this problem.

In sum, the Commission should prohibit MVPDs from entering into new and enforcing existing exclusive service contracts in order to fulfill federal policy in favor of promoting competition in the provision of MV services. While there may not have been a sufficient record to take that action in the past, much has changed in the MVPD market in the intervening years that provides a basis for Commission action now, and taking such action would be good policy. Indeed, the momentum of Commission actions designed to make the MVPD market truly competitive has increased rapidly in recent days. Less than four months ago, the Commission released the *Franchising R&O*, which is designed to remove "an unreasonable barrier to entry that impedes the achievement of the interrelated federal goals of enhanced cable competition and accelerated broadband deployment."[13] Then, less than a month ago, the Commission stated that "new entrants to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings …" and accordingly issued revised rules for cable home and telephone inside wiring designed to promote competition in the MDU/multiple tenant environments.[14] As beneficial as these recent actions will be for the competitive market generally, the benefits of competition cannot be experienced by residents of MDUs unless the Commission takes the further action of prohibiting the entrance into new and enforcement of existing exclusive service contracts. The Commission must take this additional step, and in a timely manner.

IV. The Commission Has the Authority to Prohibit the Establishment and Enforcement of Exclusive Service Contracts.

The use of exclusive service contracts impedes competition, impairs the deployment of advanced services, and is an unfair method of competition. The Commission has the authority to prohibit the use of exclusive contracts for the provision of video services to MDUs or other real estate developments. The Commission's

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13 *Franchising R&O* at para. 1.

14 *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment etc., Report and Order and Declaratory Ruling,* FCC 07-111, released June 8, 2007, at para. 1 (emphasis added).

authority is securely grounded in several provisions of the Communications Act of 1934, as amended (the "Communications Act"), and the Telecommunications Act of 1996 (the "1996 Telecom Act").

In particular, Section 601 of the Communications Act makes it a fundamental purpose of the Act "to promote competition in cable communications." [15] Section 623 of the Communications Act requires the Commission to ensure reasonable rates for basic cable services, while Section 628(a) of the Communications Act and Section 706 of the 1996 Telecom Act require the Commission to encourage the development and deployment of new services.[16] In addition, Section 628 prohibits "unfair methods of competition or unfair or deceptive acts or practices."[17] These provisions, in conjunction with Sections 1, 4(i) and 303(r) of the Communications Act, provide a mandate for Commission action in this proceeding.

A. Sections 1, 4(i) and 303(r) of the Communications Act Provide Broad Authority for Commission Action.

At the outset, it is important to note that Sections 1, 4(i) and 303(r) of the Communications Act provide the Commission with broad authority to make rules and impose restrictions with respect to matters within the ambit of the Communications Act. Section 1 of the Communications Act, for instance, mandates that the Commission shall

15 47 U.S.C. §521(6).

16 47 U.S.C. §543; 47 U.S.C. §548(a); 47 U.S.C. §157(a).

17 47 U.S.C. §548(b).

execute and enforce the provisions of this Act."[18] Section 4(i) states, "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[19] Section 303(r) provides that the Commission shall "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."[20] Thus, Sections 1, 4(i) and 303(r) empower the Commission to take broad action to fulfill the goals and functions placed on the Commission by the Communications Act. Indeed, in its recent *Franchising R&O*, the Commission specifically relied on Sections 1, 4(i) and 303(r) as a basis for its actions therein. *See,* 22 FCC Rcd 5128, at para. 54.

Furthermore, as noted in the *NPRM*, the Commission previously concluded that it had authority to regulate the disposition of cable home run wiring under Sections 4(i) and 303(r) in conjunction with the pervasive regulatory authority committed to the

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[18] 47 U.S.C. §151. *See, e.g., Universal Service Contribution Methodology*, 21 FCC Rcd 7518, ¶5 (2006) (*citing* Section 1 in support of Commission authority to promulgate universal service funding regulations.); *I.P. Enabled Services*, 20 FCC Rcd 10245, ¶28 (2005) (*citing* Section 1 in support of Commission authority to impose E911 requirements on interconnected VoIP providers).

[19] 47 U.S.C. §154(i).

[20] 47 U.S.C. §303(r).

Commission under Title VI of the Communications Act – particularly Section 623.[21] In reaching that conclusion, the Commission noted that it could properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.[22] Specifically, the Commission found that establishing rules for the disposition of MDU home run wiring was authorized pursuant to Sections 4(i) and 303(r) because the Communications Act does not prohibit such regulations and because such action was necessary to fulfill the Commission's mandates to promote competition and provide for the deployment of advanced telecommunications services.[23]

Just as permitting subscribers to make use of existing inside wiring was a lawful exercise of the Commission's authority under Section 4(i) because it promotes choice, competition and reasonable rates, Section 4(i) similarly empowers the Commission to prohibit exclusive contracts in MDUs and other real estate developments. The Communications Act mandates the promotion of competition and the promotion of

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[21] *In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, Report and Order and Second Notice of Proposed Rulemaking*, 13 FCC Rcd 3659, 3700 – 3709, ¶¶ 83-101 (1997) ("*Inside Wiring Order*"), affirmed on recon., *In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable home Wiring, Report and Order and Second Notice of Proposed Rulemaking*, 18 FCC Rcd 1342, 1345-1346, ¶¶ 4-8 (2003) ("*Inside Wiring 2nd Report and Order*").

[22] *Inside Wiring Order* at ¶83 (*citing Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975)).

[23] *Id.* at ¶¶83-101.

advanced services at reasonable rates.[24] These mandates necessitate a targeted prohibition of exclusive contracts for the provision of video services to MDUs or other real estate developments. Moreover, such action is not expressly prohibited by or inconsistent with any provision of the Communications Act.

Courts have consistently upheld Commission authority under such Section 4(i). In *New England Telephone and Telegraph Company*, for example, the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's authority to order telephone companies to lower their rates to reimburse consumers for the companies' prior earnings that exceeded the prescribed rate of return based on the authority granted under Section 4(i) of the Communications Act.[25] Even though the Communications Act did not contain an explicit provision directing the Commission to order refunds in such cases, the Court noted that "the Commission enjoys significant discretion [under Section 4(i)] to choose among a range of reasonable remedies … the Commission does not have to show that it selected the only conceivably appropriate remedy to invoke its 4(i) powers."[26]

Likewise, in *Mobile Communications Corp.*, the D.C. Circuit recognized the Commission's authority under Section 4(i) to require the winner of a "pioneer's preference" for a narrowband PCS license to pay for the license, even if the Communications Act did not specifically authorize the Commission to charge a price for

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[24] *See* Sections IV B & C, *infra*.

[25] *New England Telephone and Telegraph Company*, 826 F.2d 1101, 1107 (1987).

[26] *Id*. (c*iting, Las Cruces TV Cable v. FCC,* 645 F.2d 1041 (1981)).

a license granted to a pioneer's preference holder.[27] In that case, the Court found that the policy goals set out by Congress when it directed the Commission to use auctions to allocate such licenses supported the Commission's determination that payment for the license was "necessary in the execution of the Commission's functions" under Section 4(i).[28] The proposed prohibition on exclusive service agreements is just as necessary for the Commission to execute its statutory mandate to promote video competition and the development of advanced services, described below.

B. The Commission Has Broad Authority to Promote Competition Under Section 601 and Section 706.

The promotion of competition is a fundamental goal and function of the Commission. As set forth in Section 601 of the Communications Act, one of the principal goals of 1992 Cable Competition and Consumer Protection Act of 1992 was to "promote competition in cable communications."[29] Furthermore, Section 706 of the 1996 Telecom Act requires the Commission to utilize "measures that promote competition in the local telecommunications market" to "encourage the deployment … of advanced telecommunications capability to all Americans."[30]

The Commission recently relied, in part, on the authority provided by Section 601 and Section 706 in promulgating rules under which local franchise authorities may

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27 *Mobile Communications Corp. v. FCC*, 77 F.3d 1399,1404-1407 (1996).

28 *Id*. at 1406.

29 47 U.S.C. §521(6).

30 47 U.S.C. §157(a).

award competitive franchises for the provision of cable services.[31] In that proceeding, the Commission found that if the franchising process impeded the deployment of competitive video services, Section 601 and Section 706 supported the Commission's authority to regulate the franchising process.[32] Because exclusive service contracts also impede the deployment of competitive video services, Section 601 and Section 706 support the Commission's authority to prohibit the enforcement of such contracts. As demonstrated above, contracts that prohibit the entry of a competitive service provider into an MDU or other real estate development do more than impede the deployment of competitive video services. Such contracts literally prohibit competition, depriving the residents of MDUs subject to such contracts of the benefits of choosing their own service providers. Such contracts are fundamentally anti-competitive and contrary to the Commission's mandates under Section 601 and Section 706 to promote competition.

Similarly, in developing regulations for MDU inside wiring, the Commission noted, *inter alia*, the Communications Act's competitive mandate in Section 601 and found that regulation was needed because limitations on the disposition of inside wiring could "deter the property owner from considering alternative service providers."[33] The exclusive contracts at issue in the present proceeding flatly prohibit the consideration of alternative service providers. The prohibition of exclusive service contracts with MDUs

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31 *Franchising R&O*, 22 FCC Rcd 5132-33 at ¶¶ 61-64.

32 *Id.*

33 *Inside Wiring Order,* 13 FCC Rcd 3703 at ¶88.

therefore is necessary to foster competition as required by Section 601 Communications Act.

The Commission previously reached the same conclusion with respect to exclusive access contracts limiting access to telecommunications customers in commercial multiple tenant environments ("MTEs").[34] Although the Commission's order in that case addressed telecommunications carriers rather than cable operators and therefore arose under Title II of the Communications Act rather than Section 601, the Commission explicitly relied upon the generally pro-competitive purposes of 1996 Telecom Act and "the competitive mandate of the 1996 Act" in banning certain exclusive access contracts.[35] In the *Competitive Networks Order*, the Commission concluded that exclusive contracts for telecommunications services harmed competition in more than one way:

> For incumbent LECs, an exclusive contract may essentially constitute a device to preserve existing market power. First, an exclusive contract erects a barrier preventing other telecommunications firms from offering service to tenants in the building(s) covered by the contract. Second, where new entrants face fixed costs or otherwise have costs characterized by increasing returns to scale, the existence of incumbent LEC exclusive contracts covering some buildings actually would make it more difficult for the entrants to serve other buildings economically. Thus, exclusive contracts between incumbent LECs and building owners may impede the development of competition in the market for local telecommunications service.[36]

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[34] *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000) ("*Competitive Networks Order*").

[35] *Id*. at ¶35.

[36] *Id*. at ¶29.

Exclusive contracts for the provision of video service to MDUs produce precisely the same harms to competition in the MVPD market for precisely the same reasons. As such, the competitive mandates of Section 601 and Section 706 require the Commission to adopt the same remedy with respect to such contracts.

C. The Commission Has the Authority to Promote Advanced Services and Video Services at Reasonable Rates.

The Communications Act also requires the Commission to promote advanced services and ensure that consumers can receive video services at reasonable rates. Section 623 of the Communications Act requires the Commission to ensure, by regulation, that the rates for the basic cable service tier are reasonable.[37] As the Commission has previously noted, fostering competition among service providers is a fundamental means to ensure that cable service rates remain "reasonable."[38] Indeed, Section 623, by its terms, expresses a preference for competition over direct regulation of rates.[39] Because allowing alternative service providers to compete for MDU consumers will inevitably act to contain rates for such consumers at a "reasonable" level, the prohibition of exclusive service contracts is an appropriate, indeed preferable, way of ensuring that cable service rates remain reasonable in accordance with Section 623.

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37 47 U.S.C. §543.

38 *Inside Wiring Order,* 13 FCC Rcd 3704 at ¶89.

39 47 U.S.C. §543(a)(2).

Following this reasoning, the Commission concluded that regulation of MDU inside wiring would help to ensure reasonable rates by promoting competitive choice. The Commission stated, "We believe that such competitive choice will exert a restraining influence on rates as service providers compete for the opportunity to serve the entire building or individual subscribers."[40] Likewise, the Commission reached the same conclusion in the *Competitive Networks Order*, in which it prohibited exclusive contracts in certain multiple tenant environments ("MTEs"). In that proceeding, the Commission stated that "the use of exclusive contracts in commercial settings poses a risk of limiting the choices of tenants in MTEs in purchasing telecommunications services, and of increasing the prices paid by tenants for telecommunications services."[41] The same reasoning requires the same solution in this instance.

Similarly, Section 706 of the 1996 Telcom Act directs the Commission to "encourage deployment of advanced telecom capability to all Americans."[42] SureWest, like many other providers, offers a "triple play" of video, voice and broadband data service. The ability to offer "triple play" services has transformed cutting-edge MVPDs such as SureWest into providers of advanced telecommunications services, as envisioned in Section 706. A fundamental building block of the "triple play," however, is

[40] *Inside Wiring Order,* 13 FCC Rcd 3703 at ¶88.

[41] *Competitive Networks Order,* 15 FCC Rcd 22997 at ¶ 27.

[42] 47 U.S.C. §157(a). In addition, Section 628(a) of the Communications Act expressly states that one of its primary purposes is to "spur the development of communications technologies.47 U.S.C. §548(a).

the ability to offer video service. As the Commission recently concluded, "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."[43] An inability to offer video services seriously compromises the ability to deploy other advanced telecommunications services, both in terms of the ability to market a package of services that consumers will demand and in terms of the revenues needed to support investment in new and innovative services.

Pursuant to Section 706, the Commission must encourage the development and deployment of new and better services by enabling alternative service providers to compete for consumers. For example, SureWest recently increased broadband service for its residential customers to up to 50 Mbps synchronous speed in an attempt to differentiate itself from other competing providers.[44] Competition, not regulatory pressures, drove the decision to provide such high value service. Without such competition, however, consumers subject to exclusive contracts are unlikely to realize such competitive options and benefits.

D. The Section 628(b) Prohibition of "Unfair Practices" Provides Authority for Prohibiting Enforcement of Exclusive Contracts.

As the Commission noted in the *NPRM*, Section 628(b) specifically prohibits "unfair methods of competition or unfair or deceptive acts or practices," stating:

> [i]t shall be unlawful for a cable operator, a satellite, cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of

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43 *Franchising R&O,* 22 FCC Rcd 5133, ¶64.

44 *See*, March 19, 2007 News Release, "Meet the Man With the Fastest Internet Speed in the Country," available at http://www.surw.com/media_relations/press/releases/ShowPR.php?Head_ID=209

> competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[45]

SureWest submits that exclusive contracts are a fundamentally unfair practice insofar as they effectively eliminate the benefits of competition and choice without any corresponding benefit to the consumers subject to such contracts. To be sure, while such exclusive contracts provide clear benefits to the direct parties to such contracts – exclusive access to customers for the MVPD and, typically, a share of the revenues for the MDU owner – consumers subject to such contracts receive no such benefits. The Commission found this to be the case when it examined exclusive contracts between building owners and telecommunications providers:

> One finding of the economic literature … is that vertically related firms may enter into long term or exclusive contracts that inefficiently deter or foreclose entry to a market and thus harm consumers. We believe that exclusive contracts between building owners and telecommunications providers fit this model. Building owners and service providers may both find it advantageous to enter into such arrangements, yet those arrangements may nonetheless be harmful to MTE tenants.[46]

This discussion applies equally to exclusive contracts between building owners and MVPDs – building owners and MVPDs may find such contracts advantageous, but MDU tenants certainly do not.

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[45] 47 U.S.C. § 548(b).

[46] *Competitive Networks Order,* 15 FCC Rcd 22997 at ¶28.

In the *NPRM*, the Commission notes the similarity between the prohibitions of "unfair methods of competition or unfair or deceptive acts or practices" in Section 628(b) and the language of the Federal Trade Commission Act (the "FTC Act").[47] Section 5 of the FTC Act declares unlawful "unfair methods of competition in or affecting commerce, unfair or deceptive acts or practices in or affecting commerce."[48] Section 5 of the FTC Act defines "unfair" practices as those that "cause or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[49] This almost perfectly describes the situation of consumers subject to an exclusive contract between an MVPD and the owner of an MDU. As noted above, such consumers are injured by lack of choice. That injury is not avoidable (short of moving, though even that

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47 *NPRM* at ¶9.

48 15 U.S.C. §45(a)(1).

49 15 U.S.C. Sec. 45(n).

may not solve the problem) nor are there any countervailing benefits to such consumers or to competition generally.[50]

The definition of "unfair methods of competition" under the FTC Act is deliberately flexible to permit the FTC to address anti-competitive acts that might otherwise fall beyond the reach of the Sherman Act, the Clayton Act or other applicable law. As Supreme Court has stated, "[t]he 'unfair methods of competition,' which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act … Congress advisedly left the concept

[50] In prior proceedings, some commenters have claimed that exclusive contracts do provide certain public interest benefits. In particular, those commenters claimed that exclusive contracts are necessary to enable alternative and new MVPDs to procure financing, recoup costs, expand operations and compete in the MDU market. Those commenters also claimed that exclusive contracts give property owners leverage and the opportunity to obtain better service options and rates, which ultimately benefits residents. *See Inside Wiring 2nd Report and Order* at ¶64. SureWest submits that, to the extent these benefits ever existed, changes in the market and the passage of time have eliminated such benefits. For example, the "leverage" such exclusive contracts give to property owners clearly benefits property owners but the benefits to consumers are largely illusory: while providers seeking exclusive contracts may be competitive on rates and services when seeking exclusive contracts, once the exclusive contracts are in place, such providers have little incentive to respond to non-existent competition with better services or lower rates. Furthermore, while it may have been true a few years ago that uncertainty about the ability of a provider to recover the entire cost of serving an MDU from revenues generated by MVPD service <u>alone</u> was a disincentive to investing in wiring an MDU, the ability to generate <u>multiple</u> revenue streams from "triple play" offerings (i.e., bundled MVPD, telephony and broadband access) means that service providers do not need the guarantee of MVPD exclusivity as an incentive to investment. The fact that a new entrant such as SureWest is ready, willing and able to compete without such guarantees certainly undercuts the notion that such guarantees are necessary. Nevertheless, while new entrants do not require a <u>guarantee</u> of the entire MV service revenue in order to justify investment in broadband facilities in an MDU, good business practice requires that providers have at least an <u>opportunity</u> to compete for and obtain revenue from MV services from a certain percentage of MDU residents. Without that opportunity, the broadband investment cannot be justified or sustained. Thus, by denying competing providers the <u>opportunity</u> to recover at least <u>some</u> of their costs from MV service revenues, exclusive contracts are a barrier to the deployment of broadband networks, not an enhancement to such deployment.

flexible to be defined with particularity by the myriad of cases from the field of business."[51] Likewise, the definition "unfair methods of competition or unfair or deceptive acts or practices" under Section 628(b) must be similarly flexible to permit the Commission to address the specifics of a given set of circumstances.

It is noteworthy that the FTC has found, and the courts have confirmed, that exclusive dealing provisions may be "unfair methods of competition" under Section 5 of the FTC Act if they have an anti-competitive effect on the market.[52] In *FTC v. Motion Picture Advertising Service Co., Inc.*, for instance, the U.S. Supreme Court upheld the FTC's determination that certain exclusive contracts between movie theater owners and a distributor of advertising films were an "unfair method of competition."[53] The Court found that a small handful of distributors used exclusive contracts to lock competitive entrants out of the finite number of venues that existed for their product. The Court noted that it was "plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act."[54] The Court's description of the exclusive contracts in *FTC v. Motion Picture Advertising Service Co., Inc.* applies equally to exclusive

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[51] *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394 (1953).

[52] *See, e.g.*, *FTC. v. Brown Shoe Co.,* 384 U.S. 316 (1966); *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).

[53] *FTC v. Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392 (1953).

[54] *Id. at 395.*

contracts between MDUs and MVPDs – as described above, such contracts harm competition generally, while benefiting only the parties to the agreement.

Similarly, in *L.G. Balfour Co. v. FTC*, the U.S. Court of Appeals for the Seventh Circuit upheld the FTC's determination that several exclusive contracts used by a supplier of fraternity and high school jewelry and other products constituted an "unfair method of competition" under Section 5.[55] Significantly, the Court noted that the FTC was not required to demonstrate that the company in question exercised market power or even "substantially lessened" competition. While those findings would be required under Section 3 of the Clayton Act, under Section 5 of the FTC Act only "some showing of a lessening of competition" is required to support the conclusion that an exclusive contract is an "unfair method of competition."[56] Thus, it does not avail MVPDs using exclusive contracts to argue that the use of such exclusive contracts do not give them "market power" in some abstract larger market. It is enough that the use of these contracts produce "a lessening competition" by prohibiting competition in the affected MDUs.

E**.** <u>The Commission Has the Authority to Void Existing Exclusive Contracts</u>**.**

Given the fact that exclusive service contracts are contrary to the competitive aims of the Communication Act and the 1996 Telecom Act, the Commission must act not only with respect to future contracts, but with respect to existing contracts as well.

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[55] *L.G. Balfour Co. v. FTC*, 442 F.2d 1 (1971).

[56] *Id*. at 21.

In *Western Union Telegraph Co. v. FCC*, U.S. Court of Appeals for the D.C. Circuit held that the Commission has the power to modify provisions of private contracts when necessary to serve the public interest.[57] To remedy the public interest harms caused by existing exclusive service contracts, the Commission must exercise this enforcement authority to existing contracts. While prohibiting future exclusive service contracts may help consumers in the future, it would do nothing for consumers trapped by existing contracts today. Such contracts could lock those consumers out of competitive choices for 5 years, 10 years, or longer. Thus, the public interest demands that the Commission act to void the effectiveness of any current or future contract term that would prohibit the offering of a competitive video service to residents of MDUs or other real estate developments.

In the *NPRM*, the Commission questioned whether such action might be limited to MVPDs that possess market power.[58] As noted above, showings of "market power" are not required for the FTC to act against "unfair practices" under Section 5 of the FTC Act.[59] Similarly, it would make little sense for Commission action to be limited to MVPDs possessing market power. In any case, <u>exclusive contracts by their very nature</u>

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[57] *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495,1501(D.C. Cir. 1987) (*citing FPC v. Sierra Pacific Power Co*., 350 U.S. 348, 353-355 (1956); *United Gas Co. v. Mobile Gas Corp.,* 350 U.S. 332, 344 (1956).). *See also, IDB Mobile Communications, Inc. v. COMSAT Corporation*, 16 FCC Rcd 11474, ¶14 (2001), wherein the Commission stated that it may modify provisions of a private contract when the contract's terms "adversely affect the public interest," though it chose not to do so in that particular case.

[58] *NPRM* at ¶12.

[59] *See* note 56 *supra* and accompanying text.

convey market power to any MVPD *vis a vis* the subscribers in the MDU subject to an exclusive contract with that MVPD. The Commission has previously recognized the market definition approach taken in the U.S. Department of Justice and FTC 1992 Horizontal Merger Guidelines ("*1992 Merger Guidelines")* as an important tool in assessing market power.[60] Under the *1992 Merger Guidelines,* the essential question in assessing market power is whether consumers faced with an increase in price are able to substitute a different service or a different provider of such service. By this criterion, every exclusive MDU contract grants market power to the exclusive MVPD over subscribers residing in the MDU subject to that exclusive contract. Those subscribers must take that MVPD's service offerings at that MVPD's price or go without MVPD service. It would be of little comfort for a subscriber to know that in some abstract larger market, the MVPD faces competition, when that subscriber has no other options in his own home. It is not sufficient to say that consumers dissatisfied with their video service can leave a particular MDU. Indeed, consumers with ownership interests in their residence cannot simply leave without significant financial consequences. More fundamentally, however, no consumer should be required to move in order to obtain competitive video services.

V. Conclusion

SureWest believes that fair and open competition results in better prices and services for customers. Exclusive service contracts constitute a complete barrier to fair

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60 *See, e.g.*, *Regulatory Treatment Of LEC Provision Of Interexchange Services Originating In the LECs Local Exchange Area and Policy And Rules Concerning The Interstate, Interexchange Marketplace*, 12 FCC Rcd 15756, ¶17 (1997).

competition and consumer choice of MV services in MDUs, and in some cases to choice of broadband Internet service providers as well. These contracts also constitute a substantial barrier to investment in and deployment of advanced broadband networks. The Commission has taken steps recently to enhance competition in the MV service market, and even in the market as applied to some MDUs, but many residents of MDUs throughout the country cannot reap the benefits of competition because exclusive service contracts bar them from exercising competitive choice. Less than a month ago, Chairman Martin noted "the Commission's commitment to ensure that all consumers – including those living in apartment buildings – benefit from competition in the provision of voice and video services." In order to truly fulfill that commitment to the millions of Americans who live in apartment buildings, other MDUs, and real estate developments, the Commission must prohibit MVPDs from entering into new or enforcing existing exclusive service contracts.

Respectfully submitted,

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July 2, 2007

CERTIFICATE OF SERVICE

I, Paul J. Feldman, do hereby certify that a true copy of these *Comments of SureWest Communications was* sent this 2nd day of July, 2007 by email to the following:

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